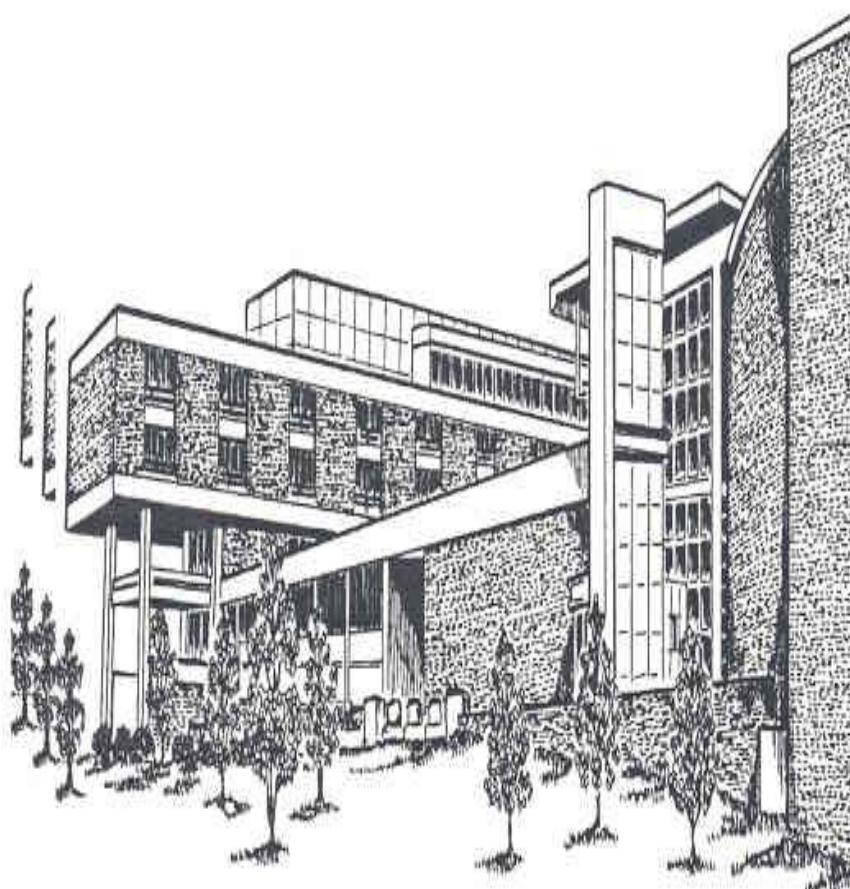


LINE OF DUTY DETERMINATIONS



22903-1781

This packet includes:

1. An extract (Part V, Chapters 37-41) from AR 600-8-1, Army Casualty and Memorial Affairs and Line of Duty Investigations;
2. A table defining the effects of a "not in line of duty, due to own misconduct" (NLD-DOM) determination;
3. A table defining the effects of a "not in line of duty, not due to own misconduct" (NLD-NDOM) determination;
4. A sample DA Form 2173, Statement of Medical Examination and Duty Status; and
5. A sample DD Form 261, Report of Investigation, Line of Duty and Misconduct.



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
CHARLOTTESVILLE, VIRGINIA 22903-1781



JAGS-ADL-P

3 December 2002

MEMORANDUM FOR Defense Technical Information Center, ATTN: Mr. Jack Rike,
8725 Kingman Road, Suite 0944, Fort Belvoir, VA 22060-6218

SUBJECT: Request for Inclusion of Publications

1. Please add the enclosed publications to the Defense Technical Information Center (DTIC) Database:

JA 231, Reports of Survey and Line of Duty Determinations, July 2002, 69 pgs.

2. Attached to this e-mail message is the SF 298, Report Documentation Page for the publication. Please direct any questions to the undersigned at (434) 972-6396 or e-mail charles.strong@hqda.army.mil.

Charles J. Strong

Charles J. Strong
DOD, GS9
Technical Editor

Encls

REPORT DOCUMENTATION PAGE			Form Approved OMB No. 0704-0188
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INTRODUCTION

Soldiers and Department of the Army civilian employees must properly care for government property for which they have responsibility. If either soldier or civilian employee breaches his duty of care toward the government property, and it causes a loss or damage, the individual might have to compensate the government for all or a portion of any loss or damage. Soldiers must also refrain from activity that could cause injury to themselves making them unfit to perform their military duties. Under certain circumstances, the government may deny certain benefits normally given in cases of physical incapacitation or disability.

Part I of this programmed instructional text introduces the student to the Army property accountability system called the “Report of Survey system.” Part II of the text introduces the student to the “Line of Duty (LOD) Investigation.” The LOD investigation is the procedure by which the Army investigates the circumstances surrounding disease, injury and death of service members. The results of a LOD investigation can substantially impact a soldier’s eligibility for disability and incapacitation benefits.

The text explains small sections of information and then requires the student to answer questions based upon the instruction. The student should answer each question and then check his answer against the solution. If the student answer is incorrect, the student should review the material again until he understands the correct answer. Each part of the text concludes with a review problem highlighting the major points covered in that portion of the text.

The student should refer to the referenced Army regulations, pamphlets, and statutes in addition to this publication since the answer may involve precise interpretation of the exact wording of the primary source.

The words "he" and "his" when used in this publication represent both the masculine and feminine genders unless otherwise specifically stated.

REPORTS OF SURVEY
AND
LINE OF DUTY
DETERMINATIONS

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PART I

ACCOUNTING FOR GOVERNMENT PROPERTY AND THE REPORT OF SURVEY SYSTEM

Part I of the programmed text explains the procedures by which the Army may hold a service member or civilian employee financially liable for lost, damaged, or destroyed government property. This portion of the programmed text has three functions:

1. To summarize significant information contained in Army Regulation (AR) 735-5;
2. To highlight information contained in other Army publications and statutes; and
3. To familiarize Judge Advocates with the various legal roles they can expect to play in the report of survey process.

After completing Part I of this text the student will be able to:

1. Identify the primary Army regulation provisions governing financial liability for lost or damaged government property;
2. List the procedures for determining financial liability for lost or damaged government property;
3. State the standards for determining financial liability;
4. Explain the consequences of a finding of financial liability and the types of relief available; and
5. Review actions recommending financial liability for lost or damaged government property.

REFERENCES:

1. U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY, (31 Jan. 1998) [hereinafter AR 735-5].
2. U.S. DEP'T OF ARMY PAM. 735-5, SURVEY OFFICER'S GUIDE, (1 Mar. 1997) [hereinafter DA PAM 735-5].
3. <http://www.usapa.army.mil/> (Official U.S. Army Publications website).

SECTION A. INTRODUCTION

Service members and civilian employees of the Army control a vast amount of government property. The importance—and difficulties—of accounting for this property cannot be overemphasized.

Both supply personnel and Judge Advocates must understand property accountability policies and procedures. The primary regulatory reference in this area is AR 735-5.

Army Regulation 735-5 establishes accounting procedures when Army property is lost, damaged, destroyed, or otherwise rendered unserviceable through causes other than fair wear and tear. Army commanders and supply personnel use the procedures of AR 735-5 to document when property is no longer available for use. Army Regulation 735-5 also authorizes methods to relieve responsible persons from pecuniary liability for lost, damaged, or destroyed property. Finally, AR 735-5 sets forth Army policy and procedures governing the assessment of financial liability against service members and civilians.

Service members and civilian employees of the Army are not absolute insurers of the condition of government property entrusted to their care. Rather, negligence or willful misconduct establishes the legal basis for assessing liability for loss or damage to government property. The “report of survey” system principally determines whether a person’s conduct caused the loss or damage and if so, whether the Army will hold that person financially liable for the loss or damage. Keep in mind however that AR 735-5 primarily sets forth supply and accountability procedures to enable Army personnel to balance the Army’s books, though the Judge Advocate will primarily advise clients and commanders on the issue of financial liability.

ANSWER THE FOLLOWING QUESTIONS:

1. [True-False] CW2 True Count, a property book officer, discovers that a jeep he is accountable for was lost in a recent field problem. He should follow the procedures in AR 735-5 to document in his records that the jeep is no longer actually present.

 2. [True-False] A soldier is absolutely liable for loss of or damage to government property under his control or in his possession. Explain your answer.
-
-

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. True. When property is lost, damaged or destroyed, AR 735-5 prescribes the accounting procedures that property book officer should use.
2. False. Negligence or willful misconduct form the basis of liability when government property is lost or damaged.

* * * * *

The Army policy makes some person responsible at all times for the care and safekeeping of Army property. This responsibility may be based on possession of the property or the scope of the person's duty.

When Army property is lost, damaged or destroyed by causes other than fair wear and tear, a commander has several options to balance the property book. Some options may impose financial liability on an individual while others may relieve a person from financial liability. The procedure used in a particular case will depend on the circumstances surrounding the loss or damage and the type of property involved. These options include:

1. Statement of Charges/ Cash Collection Voucher;
2. Report of Survey;
3. Administrative investigation under AR 15-6;
4. Collateral investigations and reports used for aircraft accidents (See AR 385-40);
5. Adjustment by unit commanders for losses of durable hand-tools up to \$100 per incident when the losses did not occur from negligence or misconduct; and
6. Abandonment order.

ANSWER THE FOLLOWING QUESTION:

Responsibility for the care and safekeeping of Army property may be based on
(a) _____ of the property or the (b) _____.

[ANSWERS ON THE FOLLOWING PAGE]

- ANSWERS:**
- (a) possession
 - (b) scope of the person's duty

* * * * *

A unit commander, primary hand receipt holder, or the accountable officer can prepare a Statement of Charges/Cash Collection Voucher (DD Form 362) when an individual admits liability and the charge does not exceed the monthly basic pay of the charged individual. By signing a Statement of Charges/Cash Collection Voucher, the individual authorizes the finance and accounting office to collect the amount of the charge from his pay. Appendix A contains an example of a properly prepared Statement of Charges/Cash Collection Voucher. Whether the person agrees to pay the debt as an immediate cash settlement, or accept the payroll deduction, the unit or activity commander uses the same DD form 362.

The unit or activity commander determines the amount of liability by assessing the property's fair market value (up to one month's basic pay). If the fair market value cannot be determined, then the unit or activity commander may use the depreciation method as explained in AR 735-5, Appendix B to determine the amount of liability.

A unit or activity commander *may not* use a Statement of Charges/Cash Collection Voucher when:

- a. sensitive items (e.g., narcotics, small arms, demolition material, etc.) are lost or destroyed, or any other time when he must use a report of survey or AR 15-6 investigation (explained shortly);
- b. the purpose of the admission of liability is to obtain possession of government property by simply paying for it. An individual must acknowledge that he will turn in all articles later recovered and that he understands that the Government will retain title to the articles listed on the form (AR 735-5, para . 12-2g);
- c. charges exceed one month's basic pay;
- d. an individual declines to admit liability.

ANSWER THE FOLLOWING QUESTIONS:

1. A Statement of Charges/Cash Collection Voucher may not be used if the case involves (a) _____ or if the value of the lost or damaged property exceeds (b) _____.
2. [True-False] A Statement of Charges/Cash Collection Voucher may be used when a soldier objects to the imposition of the charge.

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. (a) sensitive items
(b) one month's basic pay of the individual
2. True. A Statement of Charges/Cash Collection Voucher may be used only when the individual voluntarily consents to its.

* * * * *

Reports of survey are not required for property lost, damaged, or destroyed due to an aircraft accident investigated under the provision of AR 385-40. The property book officer can use the collateral investigation to adjust property records. This avoids the problem of having two separate investigations.

Losses involving hand tools have always been a problem. In an effort to give commanders more flexibility, unit level commanders are permitted to adjust losses of durable hand tools up to \$100 per incident if no negligence or misconduct is involved. AR 735-5, para. 14-25. See AR 735-5, para. 14-4, for organizational clothing and individual equipment (OCIE) losses.

A commander may use an abandonment order when he must abandon property in the course of combat, large scale field maneuvers involving simulated combat conditions, military advisor activities, or to meet other military requirements. A unit or activity commander may use the abandonment order to adjust the property accountability record if proper authority approves of the abandonment order (normally an installation or division commander).

* * * * *

A commander may appoint an AR 15-6 investigating officer instead of a report of survey investigating officer. The difference between a report of survey and an AR 15-6 investigation is one of form rather than substance. All the rights available with a report of survey are applicable to an AR 15-6 investigation. When used, the AR 15-6 report of investigation is processed through the chain of command like the report of survey and the report of survey form is still used as the adjustment document.

A report of survey is an instrument for recording the circumstances concerning the loss, damage or destruction of Army property. It serves as, or supports, a voucher for dropping the articles from the property records on which they are listed. It also serves to determine questions of responsibility (financial or otherwise) for the absence or condition of the articles. Appendix C contains a completed report of survey form. Take a few minutes to familiarize yourself with the report of survey form (DA Form 4697).

A commander *must* use a report of survey when:

- a. he suspects negligence or willful misconduct;
- b. the property loss is disclosed as a result of a change of accountable officer's inventory;
- c. the value of the admitted loss exceeds one month's basic pay;
- d. the damages or shortages in occupied government quarters (real property and furnishings combined) or government furnishings in non-government quarters exceeds the responsible person's monthly basic pay;
- e. the total handling loss of a specific bulk petroleum product exceeds the allowable loss for that product, and the dollar value of the total loss is greater than \$500.00;
- f. the loss or destruction involves a sensitive item. Note: while AR 15-6 is the required investigation vehicle for sensitive items, the Report of Survey, DA Form 4697 is used to adjust the property book;
- g. the loss or destruction involves public funds;
- h. required by higher authority or other DA regulations;
- i. the loss or damage involves a GSA vehicle and the command has not taken action under AR 735-5, para. 12-1c;
- j. the loss results from fire, theft or natural disaster.

ANSWER THE FOLLOWING QUESTION:

Captain Jones admits liability and agrees to pay for the damage to government furnishings in non-government quarters he occupied. The amount of damage is \$300. A report of survey (is) (is not) required. Explain your answer:

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: (is not). Because Captain Jones is willing to admit liability, he may voluntarily pay since the damage to government furnishings in non-government quarters does not exceed his monthly basic pay.

* * * * *

An accountable officer is the person officially designated to maintain a formal set of accounting records of property or funds. The accountable officer may or may not have physical possession of the property or funds. The three types of accountable officers are: Transportation Officer (accountable for property entrusted for shipment), stock record officer (accountable for supplies held in transit), and Property Book Officer (accountable for property at the using unit level. AR 735-5, para. 13-12. Hand-receipt holders are not included in this definition. One important ramification of being an accountable officer is that in the event an accountable officer is found to have negligently lost or damaged Army property, he is liable for the *full amount* of the loss or damage, compared to the general rule limiting liability to one month's basic pay.

A frequently asked question is whether a company commander is an accountable officer. In DAJA-AL 1980/2722, TJAG opined that a commander does not become an accountable officer within the meaning of AR 735-5 solely by virtue of his assignment as a commander. The opinion points out, however, that the nature of local circumstances and procedures may result in the commander becoming an accountable officer, if a special relationship between the commander and the property is established.

Note that in a "typical Army division" a company commander will "sign" for the property in his unit, but he is a hand-receipt holder, only. In contrast, the property book officer, often a warrant officer assigned to Division Support Command (DISCOM), will maintain the property books for one brigade and for one or more battalions in the division.

The issue raises the distinction between *responsibility* and *accountability*. Simply stated, accountability is the obligation of a person to keep an accurate record of property, documents, or funds. Accountability means keeping formal records over property. On the other hand, responsibility is the obligation of an individual for the proper custody, care, use, and safekeeping of government property. Any person may incur responsibility for the care and custody of government property, even if he has not signed a receipt for it. This responsibility may be based on possession of the property or the scope of the person's employment or duty. Accountability involves the basic obligation of accounting for property, whereas responsibility arises from possession of property or from the obligation of command or supervision of others who are in possession of property.

An individual may have both accountability and responsibility, or may have accountability without responsibility or vice versa. For example, an accountable officer who has issued property on a hand-receipt has accountability without responsibility. The individual so receiving the property has responsibility without accountability.

And although DAJA-AL 1980/2722 (discussed above) holds that a commander does not become an accountable officer solely by virtue of his assignment as a commander, a company commander is, by virtue of his assignment, responsible for all the property of the company, regardless of whether or not he has signed receipts for such property. AR 735-5, para.. 2-8a

Understanding the difference between accountability and responsibility is necessary to properly apply the principles of AR 735-5.

ANSWER THE FOLLOWING QUESTION:

[True-False] CPT Shortage, outgoing company commander and CPT Incoming, his replacement, conduct a joint change of command inventory of the company property. Five bed sheets are missing. A report of survey is mandatory, since property loss is disclosed as a result of a change of accountable officer's inventory.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: False. A company commander is not necessarily an accountable officer.

* * * * *

Another term used throughout the text is "financial liability."

The term "financial liability" refers to an individual's personal, joint, or statutory obligation to reimburse the U.S. Government for losing, destroying or damaging government property through negligence or willful misconduct. In other words, financial liability is a debt owed to the U.S. Government for the loss, damage, or destruction of U.S. Government property.

Note that the report of survey system is separate from the disciplinary measures available to the commander. The report of survey is not a form of punishment. Instead, the commander has a number of disciplinary and administrative measures to enforce supply discipline and reduce incidents of lost, damaged or destroyed government property. These measures range from an oral reprimand to an Article 15 or court-martial under the Uniform Code of Military Justice (UCMJ). The report of survey is a supply-oriented document; it is not used as a corrective action or punishment for negligence or misconduct.

ANSWER THE FOLLOWING QUESTION:

[True-False] After a soldier has been held not financially liable on a report of survey, a commander may take action against a soldier under Article 15 for the same incident.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: True. For example, disciplinary action may be taken for misconduct that was not the direct cause of the loss. Or, as a result of command inspection, it may be discovered that a supply sergeant's stocks are \$10,000 short. Disciplinary action may be appropriate against not only the supply sergeant, but also supervisors and commanders in the chain of command if investigation revealed inadequate command supervision (i.e., required inventories had never been made or verified).

* * * * *

In short, a report of survey is a supply or accounting instrument used by the Army to record the circumstances covering the loss, damage, or destruction of government property.

The Army derives its authority to operate the report of system from two federal statutes:

10 U.S.C. § 4832 (2001):

“The Secretary of the Army may prescribe regulations for the accounting for Army property and the fixing of responsibility for that property.”

10 U.S.C. § 4835 (2001):

(a) Under such regulations as the Secretary of the Army may prescribe, any officer of the Army or any civilian employee of the Department of the Army designated by him may act upon reports of surveys and vouchers pertaining to the loss, spoilage, unserviceability, unsuitability or destruction of or damage to property of the United States under the control of the Department of the Army.

(b) Action taken under subsection (a) is final, except that action holding a person pecuniarily liable for loss, spoilage, destruction, or damage is not final until approved by the Secretary or an officer of the Army designated by him.

ANSWER THE FOLLOWING QUESTION:

[True-False] A statutory basis exists for the Army's report of survey system.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: True.

* * * * *

SECTION B. REPORT OF SURVEY SYSTEM

This section summarizes how the report of survey system operates and provides an "overview" of the process.

The primary hand-receipt holder, or the individual accountable for the property normally initiates a report of survey. When the hand receipt holder or accountable officer is not available, the person with the most knowledge of the incident will serve as the initiator. He prepares a brief statement (entered in block 11 of DA Form 4697) describing the loss or damage and explaining how it occurred. The appointing/approving authority uses this statement to determine whether he needs to appoint a survey officer, assess financial liability without an investigation, or grant relief from responsibility without taking additional action.

Regardless of who initiates the report of survey, the initiator forwards the report of survey with original exhibits (and copies) with a document number to the chain of command of the individual responsible for the property at the time the incident occurred. The accountable officer retains one copy to temporarily support the entries in his property book or other property record. The appointing/approving authority must be an Army officer in a command position in the grade of lieutenant colonel or above, DA civilian employees in supervisory positions in the grade of GS-14 or above, chiefs of HQDA staff agencies , and MACOM Commanders.

The appointing/approving authority is normally the battalion commander. He reviews the survey to determine the proper action. (NOTE: Approving authority can be retained at the colonel level or higher and a lieutenant colonel or GS/GM-13 can be designated appointing authority. Appointing authorities, among other duties, appoint report of survey investigating officers; however, they do not approve completed report of survey investigations. In practice, the approval authority is also the appointing authority if he decides to conduct a survey. In the National Guard, however, the approval authority must be an O-6 level commander.)

The appointing/approving authority may decide there is enough information in block 11 to make a decision without further investigation. This is known as a "short survey." If the approving authority decides there is insufficient evidence of negligence and that no individual should be held liable for the loss, he may order relief from accountability and responsibility. If he decides there is sufficient evidence to hold an individual financially liable for the loss or damage, he may compute the charge and notify the individual of the charge and any appeal rights. Or he may return the report of survey to the person who initiated it, if the evidence presented is conflicting or not complete enough for a clear understanding of the circumstances. Another option available to the approving authority is to appoint a surveying officer (or an investigating officer under AR 15-6).

Under some circumstances the appointing/approval authority must appoint a survey officer. These circumstances include:

- (1) when the person concerned should be charged with responsibility for the loss or damage;
- (2) when a higher authority directs the report of survey; and
- (3) when stockage is lost at certain storage depots.

As noted above, the approving authority may recommend liability without appointing a surveying officer if the evidence reflected on the report of survey, DA Form 4697, clearly establishes negligence. This allows the commander to shorten the process by eliminating the surveying officer. It does not eliminate any rights for the individual for whom liability is recommended.

ANSWER THE FOLLOWING QUESTIONS:

1. [True-False]. Under certain circumstances, the appointment of a survey officer by the appointing/approving authority is mandatory.
2. The appointing/approving authority is normally a _____ Commander.

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. True. The approving authority must appoint a surveying officer in three specific instances.
2. Battalion

* * * * *

The survey officer investigates to determine the facts surrounding the loss or damage of Army property and then submits findings as to how the loss or damage occurred and whether fault or negligence was involved. The survey officer must be a commissioned officer or warrant officer; an Army noncommissioned officer in the grade of sergeant first class (SFC) or above; a civilian employee GS-7 or above, or a wage leader (WL) or wage supervisor (WS) employee. AR 735-5, para. 13-26.

The survey officer must be senior to the person subject to financial liability except when impractical because of military exigencies. If the survey officer discovers that the investigation requires examining the conduct of a person senior to him, the survey officer will notify the appointing/approving authority. The appointing/approving authority can either appoint a new survey officer or direct the investigation to continue if military exigencies make the change impractical. Whenever the approving authority does not appoint a senior survey officer, he must document that decision as an exhibit to the survey. The survey officer makes recommendations based on his findings and the policies set forth in AR 735-5. A survey officer's primary duty is to conduct the report of survey investigation.

If the survey officer recommends holding an individual financially liable, the survey officer must give the individual **seven** calendar days to examine the report of investigation and all exhibits before the survey officer forwards it to the approving authority. If the individual is not readily available, the survey officer must mail a copy of the investigation and all exhibits to the individual for comment. The survey officer must use certified or registered mail. Before taking further action the surveying officer must wait **fifteen** calendar days for a reply if the individual is in the same country as the survey officer. If the individual and survey officer are in different countries the waiting period is **thirty** calendar days. The survey officer must fully consider and attach any statement submitted by the individual. The individual may submit new or added evidence in his defense. The survey officer must consider the evidence as though it has been available earlier. The survey officer notes his consideration of the added evidence. If the survey officer changes his findings and recommendations based on this new evidence he will so amend the report.

The survey officer should explain whether a finding of gross negligence or willful misconduct is warranted in cases involving damage to government housing, furnishings or equipment associated with government housing. If the survey officer makes such a finding, then he should inform the individual that his financial liability could include the full amount of the damage. In such cases, the survey officer must also inform the soldier of his right to request that the approving authority waive in whole or in part the claim for damage under 10 U.S.C. § 2775.

An example of the notification memorandum may be found at AR 735-5, Fig. 13-12. The survey officer must forward the completed survey to the approving authority within **thirty** calendar days (active component) or **sixty** calendar days (reserve component and national guard). The survey officer may request an extension if he requires more time to investigate or he is waiting for a reply from a soldier against whom financial liability is recommended.

ANSWER THE FOLLOWING QUESTION:

[True-False] A surveying officer submits both findings and recommendations to the approving authority.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: True.

* * * * *

The approving authority must review the report of survey. He may agree or disagree with the survey officer's findings and recommendations. If he disagrees with the findings and recommendations, he must enter a statement in item 34 on the report of survey form explaining his rationale for the change. If financial liability is the new recommendation, like the survey officer, the approving authority must allow the individual the opportunity to respond with rebuttal evidence as explained above. The approving authority may adopt the survey officer's recommendations as his own or return the report of survey to the survey officer if further investigation is required. The approving authority reviews the report of survey to ensure that it is accurate and complete. The approval authority takes final action "by authority of the Secretary of the Army."

If the approval authority decides to impose financial liability based on the survey, a judge advocate (or DA civilian attorney) must review the findings for legal sufficiency. This review must occur before the approving authority takes action. Note that the approving authority has considerable latitude in processing the report of survey. Note too that the approving authority may approve a financial charge even if the surveying officer and reviewing judge advocate have recommended against assessing financial liability, but the finding must be based upon the available evidence.

ANSWER THE FOLLOWING QUESTIONS:

1. If the approving authority makes a finding of financial liability, contrary to the recommendation of the surveying officer or reviewing judge advocate, what steps must he take to protect the rights of the individual concerned? Explain your answer:

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. If the approving authority makes a finding of financial liability, he must notify the individual concerned and allow him or her the opportunity to examine the report of investigation. The approving authority must fully consider any response and attach it to the report of survey. If new or added evidence is submitted, and the approving authority still recommends financial liability, the approving authority will note that the added evidence has been considered (i.e. the approving authority takes the same action the surveying officer would have taken had the survey officer originally recommended financial liability). The approving authority must also reduce to writing his rationale for assessing financial liability contrary to the recommendations.

* * * * *

The approving authority must notify individuals held financially liable on reports of survey. A sample notification memorandum is located at AR 735-5, Figure 13-12a. The purpose of this notice is to ensure that the person found liable is aware of his rights after liability assessment. Once the person held liable acknowledges receipt of this notice letter, the **thirty**-day period within which the person must file a request for reconsideration (unless good cause exists for greater delay) starts. If the request for reconsideration period expires without action by the respondent, the approving authority will forward the report of survey to the finance and accounting office for collection.

If an approving authority rejects the survey officer's recommendation for financial liability, he must notify the individual. The approving authority will give such notice by certified letter in the event he cannot notify the individual in person or by telephone.

An enlisted soldier may additionally request remission or cancellation of the debt.

AR 735-5 proscribes total processing time under normal circumstances. Processing time for the active component will be no more than **75 calendar days**. Processing time for the reserve component will be no more than **240 calendar days**. Processing time for the National Guard will be no more than **150 calendar days**. Failure to comply with this processing time requirement, however, does not invalidate the report of survey or provide the person held liable a basis for relief.

ANSWER THE FOLLOWING QUESTION:

The (a) _____ takes final action on a report of survey "by authority of the
(b) _____".

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS: (a) approving authority
(b) Secretary of the Army

* * * * *

SECTION C. STANDARDS FOR DETERMINING FINANCIAL LIABILITY

Army Regulation 735-5 sets forth the basic guideline—When a person's negligent acts proximately cause loss, damage or destruction to government property, the person may be held financially liable. Willful misconduct or gross negligence proximately causing loss, damage or destruction to government property can also be the basis for financial liability for the property. Simple negligence is the standard of care under the report of survey system. Simple negligence is defined as an act or omission that a reasonable person would not commit under similar circumstances. When considering whether the conduct was reasonable, one should consider a variety of factors enumerated in AR 735-5, para.13-28 to determine the reasonableness of a person's conduct. Willful misconduct means any intentionally wrongful or unlawful act dealing with the property concerned. Gross negligence is defined as an extreme departure from due care. Note that misconduct also includes wrongful appropriation.

Whether the facts support simple negligence, gross negligence or willful misconduct, the facts must also establish proximate cause. Proximate cause is defined as the cause that, in a natural and continuous sequence, unbroken by a new cause, produces the loss or damage, and without which the loss or damage would not have occurred. It is further defined as the primary moving cause, or predominate cause, from which the injury follows as a natural, direct, and immediate consequence, and without which it would not have occurred. As one might expect, the concept of proximate cause is not always clearly understood by surveying officers and approving and appellate authorities. A judge advocate often must explain or interpret proximate cause in light of a particular fact situation.

ANSWER THE FOLLOWING QUESTIONS:

1. Financial liability will result when a person's negligence or (a) _____ toward government property is the (b) _____ of any loss, damage, or destruction of such property.

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. (a) willful misconduct
- (b) proximate cause

* * * * *

This definition of proximate cause does not foreclose application of general legal principles about proximate cause. Judge advocates may use general legal principles and recognized authorities such as the Restatement (2d) Torts as appropriate. For example, reports of survey raising the issue of whether an intervening force is a superseding cause is not specifically addressed by AR 735-5 but is nonetheless key to establishing proximate cause. Therefore, examining sources such as the Restatement (2d) Torts is invaluable in appropriate cases. When applicable, you may use these principles to determine whether negligence or willful misconduct is the proximate cause of a loss for purposes of AR 735-5.

ANSWER THE FOLLOWING QUESTION:

[True-False] The definition of proximate cause in AR 735-5 precludes application of general legal principles about proximate cause.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: False.

* * * * *

Army Regulation 735-5, Appendix C-4, sets forth specific considerations for the survey officer. These considerations help a survey officer solve actual problems he may encounter. For example, a survey officer should consider a person's relationship (i.e. type of responsibility) over the property in determining whether an act or omission was reasonable or not.

Typically one envisions a soldier wrecking a vehicle or some other damage or destruction to Army property when one thinks of reports of survey. It is important to remember that losing accountability through negligence can also make a person financially accountable.

ANSWER THE FOLLOWING QUESTIONS:

1. The relationship of the individual to the property [does] [does not] determine the standard of negligence (i.e., gross or simple negligence) to be applied.
2. Staff Sergeant (SSG) Klink, a supply sergeant, issued ten fans from his supply room, obtaining a hand- receipt for only six of the fans. During a later inventory, the company commander asked SSG Klink to account for the fans. SSG Klink could account for only the six hand-receipted fans. An examination of the company area produced three of the four missing fans. Will SSG Klink most likely be held financially liable for any of the fans? Explain your answer:

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. does not
2. SSG Klink will most likely be held liable for the loss of one fan. Loss includes loss from government accountability. Unless unusual circumstances were present, SSG Klink was negligent in not using a hand-receipt to maintain accountability for each fan, and the loss of accountability was the proximate result of his negligence. SSG Klink will not be held liable for the remaining three fans, since they can now be accounted for as a result of the physical inventory.

* * * * *

The survey officer and approving authority must also apply the following principles to determine the financial charge:

- (1) If the property is economically repairable, determine the cost of repairs.
- (2) For irreparably damaged property, determine the value of the property immediately before the loss through appraisal and its fair market value after the loss (using a technical inspector).
- (3) If the property is irreparably damaged and technical inspection is impossible, use a depreciation formula to determine the value of the property.

Army Regulation 735-5, Appendix B provides more detailed guidance concerning financial charges. For example, one can use an allowance for standard rebuild cost instead of depreciation in certain circumstances. Further, one must only use depreciated value when he cannot determine the fair market value.

The financial charge is the cost of repairs or if the property is lost, destroyed, or irreparably damaged, the financial charge is the actual value of the item at the time of the loss, destruction or damage. Once an approving authority finds a person financially liable for loss, damage or destruction to Army property, and computes the financial charge, he then must decide how much of that loss the person owes to the United States. Several rules apply:

Accountable officers are financially liable to the United States for the full amount of loss (less depreciation). Collection from an accountable officer is based on 37 U.S.C. § 1007(f), which mandates collection of the full amount.

All soldiers, regardless of component, will be liable to the Government for the full amount of loss (less depreciation) in cases of lost, damaged, or destroyed personal arms and equipment. Personal arms and equipment is defined as equipment or clothing items issued to the individual for his sole use and care. When deciding what constitutes personal arms or equipment, determine how the soldier uses the property, and whether the item is turned in at the end of the work shift. Examples of personal equipment include: handguns, flashlights,

protective masks, binoculars, weapons, and personal radios when used constantly by the individual, carried by him wherever he goes, and he carries it for an indefinite time. Note that such items become personal equipment only when they are issued to the using person for personal use. Therefore items such as motor vehicles, office furniture, government furnishings, and typewriters are not classified as personal equipment. Collection is based on 37 U.S.C. § 1007(e), requiring collection of the full amount of the loss.

ANSWER THE FOLLOWING QUESTIONS:

1. For destroyed government property, the financial charge is the _____ of the property at the time of the loss.
2. [True-False] Accountable officers will be held financially liable for the full amount (less depreciation) of loss.

[ANSWERS ON THE FOLLOWING PAGE]

- ANSWERS:**
1. actual value
 2. True.

* * * * *

Any person found financially liable for loss of public funds will be charged for the full value of the loss.

Soldiers are generally limited to one month's basic pay or the amount of the loss to the Government (less depreciation), whichever is the lesser amount, for all property except as stated above. Financial liability of civilian employees for losses to government property, including personal arms and equipment, is limited to 1/12 of his annual salary or the amount of the loss to the Government (less depreciation), whichever is the lesser amount. A civilian employee who is an accountable officer is not protected under this rule and is subject to full liability as explained above.

For soldiers, combined losses of personal arms and equipment and other equipment and property arising from a single incident may result in charges greater than one month's basic pay. The personal arms and equipment loss is added to either (1) the actual loss of other equipment and property, if that loss amounts to less than one month's basic pay, or to (2) one month's basic pay, if the other equipment and property loss is greater than one month's basic pay.

Finally, when the approving authority finds that government quarters, furnishings, or equipment associated with government quarters were lost, damaged, or destroyed as a result of gross negligence or willful misconduct on the part of a soldier, their dependents, guests, or pets the soldier is liable for the full amount of the loss.

ANSWER THE FOLLOWING QUESTIONS:

1. Losses to personal arms and equipment (PA&E) -- soldiers:

	<u>BASIC PAY</u>	<u>ACTUAL LOSS</u>	<u>AMOUNT CHARGED</u>
Officer and	\$800	\$ 50	_____
Enlisted	\$800	\$900	_____

2. Losses to other equipment or property (OEP):

	<u>BASIC PAY</u>	<u>ACTUAL LOSS</u>	<u>AMOUNT CHARGED</u>
All personnel	\$1,000 \$1,000	\$ 100 \$15,000	_____

3. Combined PA&E and OEP losses -- soldiers:

	<u>BASIC PAY</u>	<u>ACTUAL OEP LOSS</u>	<u>ACTUAL PA&E LOSS</u>	<u>AMOUNT CHARGED</u>
Officer and Enlisted	\$1,000 \$1,000 \$1,000	\$ 500 \$ 700 \$5,000	\$200 \$400 \$200	_____ _____ _____

4. Specialist (SPC) Speedy, the unit supply clerk, was required to transport fifteen binoculars and protective masks to the field for use by other members of the unit in a field training exercise. On the way he negligently wrecked the vehicle he was driving and the binoculars and protective masks were destroyed. The amount of the loss to the binoculars and protective masks exceeds his basic pay. Will SPC Speedy be held liable for the full amount of the loss? Explain your answer:

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. Losses to personal arms and equipment (PA&E) -- soldiers:

	<u>BASIC PAY</u>	<u>ACTUAL LOSS</u>	<u>AMOUNT CHARGED</u>
Officer and	\$800	\$ 50	\$ 50
Enlisted	\$800	\$900	\$900

Note that for personal arms and equipment, the soldier will be held liable for the full amount of the loss, even if the loss exceeds 1 month's basic pay.

2. Losses to other equipment or property (OEP):

	<u>BASIC PAY</u>	<u>ACTUAL LOSS</u>	<u>AMOUNT CHARGED</u>
All personnel	\$1,000	\$ 100	\$ 100
	\$1,000	\$15,000	\$1,000

Note that the maximum liability is 1 month's basic pay.

3. Combined PA&E and OEP losses -- soldiers:

	<u>BASIC PAY</u>	<u>ACTUAL OEP LOSS</u>	<u>ACTUAL PA&E LOSS</u>	<u>AMOUNT CHARGED</u>
Officer and	\$1,000	\$ 500	\$200	\$ 700
Enlisted	\$1,000	\$ 700	\$400	\$1,100
	\$1,000	\$5,000	\$200	\$1,200

Applying the rules just explained, you should charge the soldier the full amount of the loss of personal arms and equipment and charge the loss of other equipment and property up to 1 month's basic pay; then add these two charges together for the total charge.

4. The binoculars and protective masks were not personal arms or equipment because they were not assigned for SPC Speedy's personal use or performance of duty. Instead, he was merely transporting them to the field, so other soldiers in the unit could use them. Therefore, SPC Speedy's maximum liability is one month's basic pay.

* * * * *

What happens if two or more persons are found liable for the lost, damaged, or destroyed property? The next section explains this fairly common occurrence.

* * * * *

SECTION D. COLLECTIVE AND INDIVIDUAL LIABILITY

When two or more entities are held collectively and individually liable for a single loss, the charges are computed as follows:

(1) When the actual loss *exceeds* the combined monthly basic pay of each person held liable, each person is charged the full amount of his basic pay. This rule does not apply when the one-month limitation does not apply, ie. loss of personal arms or equipment.

(2) When the actual loss is *less than* the combined monthly basic pay of all persons being held liable, the charges should be apportioned in proportion to each person's basic pay. Use the following formula (see AR 735-5, Table 12-4):

$$\frac{\text{Person's monthly basic pay} \times \text{actual loss}}{\text{Combined monthly basic pay of all persons}} = \text{Person's financial charge}$$

Example:

Actual loss = \$1,000

Person A's basic pay = \$300

Person B's basic pay = \$600

Person C's basic pay = \$900

Total basic pay = \$1,800

Person A's financial charge is computed as follows:

$$\frac{\$300}{\$1,800} = .16667 \times \$1,000 = \$166.67$$

Person B's financial charge is computed as follows:

$$\frac{\$600}{\$1,800} = .33333 \times \$1,000 = \$333.33$$

ANSWER THE FOLLOWING QUESTION:

Using the above example, compute C's financial charge.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER:

Person C's financial charge:

$$\begin{array}{r} \$900 \\ \hline \$1,800 .50000 \times \$1,000 = \$500 \end{array}$$

One can check the figures when the actual loss is less than the combined monthly basic pay, by adding each person's financial charge. The sum should be the actual loss to the Government. Here for example, \$500 + \$333.33 + \$166.67 = \$1,000.

* * * * *

SECTION E. RECONSIDERATION AND REMISSION OF INDEBTEDNESS

Any headquarters having previously acted on a report of survey may decide that it should be reopened, corrected, or amended. A unit must send a letter explaining the basis of the decision to (through any intermediate headquarters) the approving authority.

A respondent may submit a request for reconsideration. A request for reconsideration is a request for relief based on legal error in the case. The respondent must submit the request for reconsiderations within thirty days of his notification of liability. The approving authority has several options:

- (1) Deny the requested relief;
- (2) Make minor corrections not involving important changes of findings or recommendations of the surveying officer;
- (3) Amend the final action, with or without conducting a further investigation;
- (4) If the property is recovered, reopen the survey and follow the procedures in AR 735-5, para. 14-16.

ANSWER THE FOLLOWING QUESTION:

A request for reconsideration is initially acted on by the _____.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: approving authority

* * * * *

The appeal authority is normally the approving authority's next higher commander (or certain other individuals, as provided in AR 735-5, para. 13-49). The appeal authority takes final action on all appeals of reports of survey "by authority of the Secretary of the Army." An officer directly responsible or accountable for the property listed on the report of survey may not act as an appeal authority on that report of survey. Also, an officer who has acted as the approving authority also may not act as the appeal authority on that report of survey. When the appeal authority is disqualified from acting on a report of survey, the appeal will be forwarded to the next higher commander. The authority to act on appeals of reports of survey may be delegated, in certain instances, to an officer in the rank of Colonel or higher.

ANSWER THE FOLLOWING QUESTION:

The appeal authority on a report of survey is normally the _____
_____.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: approving authority's next higher commander

* * * * *

A service member may seek relief from financial liability under AR 735-5 by requesting reconsideration, described above. Additionally, an active duty, USAR, or ARNG enlisted member may submit a petition for remission or cancellation of indebtedness. Note that this procedure is not available to officers, civilian employees, or former enlisted soldiers. The only basis upon which a qualifying service member can petition for remission of indebtedness is "extreme financial hardship." Petitions based on injustice are not proper for consideration for remission. Procedurally, a service member must first submit a request for reconsideration to the approving authority before the approving authority will process a petition for remission of indebtedness.

The Secretary of the Army may remit any part of an enlisted soldier's indebtedness remaining unpaid before or at the time of his honorable discharge if the action is considered in the best interest of the United States. Authority to take final action on requests for remission or cancellation of indebtedness is restricted to Commander, Total Army Personnel Command (PERSCOM). While commanders do not have the authority to remit or cancel indebtedness, they are required to suspend collection of the debt pending a final decision on the request for remission. AR 600-4, para. 3-5.

A service member may also seek an extension of the collection period. The service member must submit a request through his commander to the servicing Finance and Accounting Office (FAO). AR 735-5, para. 13-45.

A service member may also seek relief by petitioning the Army Board for Correction of Military Records under AR 15-185.

ANSWER THE FOLLOWING QUESTIONS:

1. A request for reconsideration is a request for relief based on the (a) _____, while a request for (b) _____, which is limited to (c) _____ members of the Army, is based on (d) _____.
2. [True-False] Commanders below the Department of the Army level must suspend collection when an enlisted soldier submits a request for remission of indebtedness.

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. (a) legal error
(b) remission of indebtedness
(c) enlisted
(d) extreme financial hardship
2. True. Commanders and/or the servicing FAO must suspend collection until Commander, PERSCOM takes final action.

* * * * *

One final note—in advising soldiers or commanders concerning requests for remissions of indebtedness, you may want to consult these references:

- (1) AR 600-4, Remission or Cancellation of Indebtedness for Enlisted Members, 1 Apr. 1998 (providing guidance concerning submitting and processing such requests).
- (2) 10 U.S.C. § 4837 (Settlement of accounts: remission or cancellation of indebtedness of enlisted members).

* * * * *

SECTION F. COLLECTION FROM PAY

A person liable for damage or loss of Army property may always volunteer to pay the amount due. In some cases, the Army can also collect payment involuntarily. This right, however, to involuntarily attach or stop an individual's current pay does not follow automatically from the administrative determination of liability, but in each case must be specifically authorized by statute.

1. Enlisted Personnel. Under 37 U.S.C. § 1007(c) and (d), The government may deduct up to two-thirds of an Army or Air Force enlisted member's current pay (including clothing allowance) to compensate for loss, damage or destruction to government property. Similarly, if the member still owes money at the time of separation, the government may attach his final pay and allowances, but cannot take more than two-thirds of his pay for given month. Consequently, any charge exceeding two-thirds, i.e. a full month's basic pay will be automatically prorated over two or more months.

2. Officer Personnel. Officers and enlisted soldiers are now treated the same in regard to withholding.

ANSWER THE FOLLOWING QUESTION:

Compensation for lost or damaged government property may be involuntarily withheld from a soldier's (a) _____ pay or (b) _____ pay.

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS: (a) current (monthly)
(b) final

* * * * *

3. Civilians. There is statutory authority for withholding the current pay of a civilian employee without his written consent. DFAS-IN, Reg. 37-1 (Sep. 95) *available at* <http://www.asafm.army.mil> provides an excellent summary of the procedures required before collection may be made from the civilian employee's current or final pay upon separation from employment and, if needed, from benefits accrued in the Civil Service Retirement Fund.

As a last resort, when no other method of collection is available, the Army may elect to attempt collection by requesting the Department of Justice to file suit under AR 27-40, ch. 4.

JA 231, app. D summarizes the Army's authority to collect for lost, damaged or destroyed government property.

ANSWER THE FOLLOWING QUESTION:

Involuntary collection from current pay is available in all cases involving (a) _____
_____ and (b) _____ personnel.

[ANSWERS ON THE FOLLOWING PAGE]

- ANSWERS:** (a) enlisted and officer
(b) civilian

* * * * *

SECTION G. ROLE OF THE MILITARY ATTORNEY

Judge advocates play a role in reports of survey and other accountability procedures pertaining to lost, damaged, or destroyed government property.

First, the judge advocate might advise a survey or an investigating officer prior to or during a report of survey or an AR 15-6 investigation. When initially briefing a surveying officer on his duties, use DA PAM 735-5, Survey Officer's Guide. This pamphlet introduces the survey officer to his duties and explains the factors he should consider and principles he should follow when conducting his investigation. Using DA PAM 735-5 allows the survey officer to have a ready reference he can read at his convenience and saves time in your initial briefing to survey officers.

Second, the judge advocate might advise a respondent under a report of survey. While AR 735-5 expressly provides a right to legal advice only upon a recommendation of financial liability by the surveying officer, in practice, a judge advocate normally provides advice to service members prior to an adverse determination. The advice may take the form of an interview in which the judge advocate provides guidance to ensure that all pertinent facts are revealed and counseling as to how the facts should be presented in a statement the individual may wish to submit for the surveying officer's consideration. In some cases, the survey officer might have read UCMJ Art.31 warnings to a service member. In that instance, the service member might seek the advice of an attorney. Remember that AR 735-5 requires the Staff Judge Advocate's Office to provide legal advice when requested by civilian employees, as well as soldiers, against whom a charge is recommended.

ANSWER THE FOLLOWING QUESTIONS:

1. [True-False] It is proper for a JA officer to advise a surveying officer before the surveying officer completes and submits his report of survey to the approving authority.
2. [True-False] A JA officer may provide advice to both soldiers and civilian employees concerning reports of survey.

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. True.
2. True.

* * * * *

Third, AR 735-5 requires a judge advocate to legally review all cases in which the survey officer recommends financial liability. When performing the legal review, a judge advocate must offer his opinion as to whether the evidence supports the findings and recommendation. A judge advocate must complete this legal review before an approving authority can approve liability. A copy of the legal review is included as part of the report of survey record.

Fourth, a judge advocate must provide advice on requests for reconsideration and request for remission of indebtedness.

Finally, AR 735-5 requires another legal review (by a different judge advocate) before the appeal authority may take final action on a request for reconsideration. This review is similar to the legal review performed prior to the approving authority action described above.

Potential conflicts of interest exist because of the differing roles judge advocates play in the report of survey process. A judge advocate must carefully ensure that he does not improperly advise parties with adverse interests. A judge advocate cannot advise both the respondent and either the survey officer, approving authority or appeal authority of that same report of survey. Further, the judge advocate who performs the initial legal review for the appointing authority cannot also perform the legal review for the appellate authority.

ANSWER THE FOLLOWING QUESTIONS:

1. [True-False] A judge advocate must conduct a legal review when the survey officer recommends financial liability before both the approving authority and appeal authority takes their actions.
2. [True-False] The same judge advocate can perform both legal reviews described in question 1, as long as he has not advised the individual being held financially liable.

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. True.
2. False. Having the same judge advocate perform the legal review before the approving authority acts and then again before the appeal authority acts may preclude the individual appealing the charge from receiving a truly independent review on reconsideration. AR 735-5 expressly prohibits this practice.

* * * * *

SECTION H. APPLICATION OF ARTICLE 31, UCMJ

While reports of survey and similar procedures are not disciplinary or punitive measures, using such property accountability procedures does not preclude the separate use of disciplinary measures when appropriate. In fact, the survey officer may develop evidence suggesting that a subject may have committed the crime of larceny. This raises the issue about when a survey officer should read an individual his rights warning under UCMJ art. 31.

Survey officers should be cautioned to advise a service member of his rights under UCMJ art. 31 anytime the survey officer suspects him of having committed an offense punishable by court-martial. Even though a violation of UCMJ art. 31 does not preclude the use of the statement in administrative proceedings, it might jeopardize future judicial proceedings. Therefore, when in doubt, the safer practice is to provide the warnings. This is particularly important when willful misconduct is suspected.

ANSWER THE FOLLOWING QUESTION:

[True-False] The survey officer failed to read a soldier his rights under Article 31 even though the soldier was a suspect. The survey officer can consider the statement and others in determining whether to hold the individual liable.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: True. There is no exclusionary rule under the report of survey system for failure to comply with Article 31.

* * * * *

REVIEW PROBLEM:

Sergeant (SGT) Burns, after a night of bar hopping, returned to his barracks room at Fort Blank. Deciding to have one more cigarette, SGT Burns sat down in an over-stuffed chair in his barracks room and "lit up." Overcome by tiredness, he placed the burning cigarette in a shallow ashtray sitting on the arm of the chair and walked to his bunk soon falling fast asleep. Shortly after he fell asleep, the smell of smoke and burning chair awoke SGT Burns. He poured a small quantity of water on the smoldering spot and went back to sleep. Several hours later, SGT Burns again awoke from the smell of burning chair and smoke. He poured more water onto the chair and again returned to his bunk. Later still, another resident of the barracks noticed the smoldering chair in the latrine. Recognizing that it was from Burns' room, he walked to SGT Burns' room, pounded on his door exclaiming, "Burns, your chair is smoldering in the latrine." SGT Burns said that he would take care of the chair, but he fell back asleep without checking on the chair. In the morning, another barracks resident awoke to find his room full of smoke. He immediately called the fire department. The chair, which was government-issued and had a present value of \$60, was destroyed. The latrine window sash and frame were burned (\$50 replacement cost). In addition, there was smoke damage to the latrine and hallways (\$100 for repainting).

ANSWER THE FOLLOWING QUESTIONS:

1. In terms of the damage to the building, the standard for liability would be (a) _____ negligence or (b) _____.
2. A report of survey [would] [would not] be required if SGT Burns voluntarily agreed to pay for the amount of damage.
3. If a report of survey or AR 15-6 investigation were conducted, the approving authority would be the _____.

[ANSWERS ON THE FOLLOWING PAGE]

REVIEW PROBLEM ANSWERS:

1. (a) simple
 (b) willful misconduct
2. would not. Since the total amount of damage does not exceed one month's basic pay, under these circumstances a report of survey is not required.
3. battalion commander

PART II. LINE OF DUTY DETERMINATIONS

This portion of the programmed text introduces the student to the Army's Line of Duty system. Part II has two functions:

1. To highlight significant information contained in Army Regulation 600-8-1, Army Casualty and Memorial Affairs and Line of Duty Investigations (18 September 1986); and
2. To introduce Army judge advocates with various roles they may expect to play in the Line of Duty investigation system.

At the conclusion of Part II of this text you will be able to:

1. Identify the possible Line of Duty determinations;
2. Identify the legal requirements for the different Line of Duty determinations;
3. Advise Army members of (a) their rights in a Line of Duty investigation and (b) the consequences of an adverse determination; and
4. Review completed Line of Duty actions for legal sufficiency.

REFERENCES:

The major reference source on the Line of Duty system is Army Regulation 600-8-1, Army Casualty and Memorial Affairs and Line of Duty Investigations (18 September 1986). The emphasis in this programmed text is on the legal, rather than on the administrative and processing, aspects of line of duty cases.

SECTION A. INTRODUCTION TO THE ARMY'S LINE OF DUTY SYSTEM

The Army's Line of Duty system starts from the premise that every soldier who incurs an injury or disease while conducting himself properly as a member of the Army is entitled to certain benefits. These benefits include pay and allowances, accrual of service and leave, and, in some cases, disability retirement. The Army uses the Line of Duty system to determine who is eligible to receive these benefits.

Before looking at a soldier's eligibility for benefits, however, we first need to know when a line of duty determination is required. Basically, the rule is this: a line of duty determination is necessary whenever a soldier incurs an injury or disease, which incapacitates the soldier from the performance of duty.

ANSWER THE FOLLOWING QUESTION:

Would a line of duty determination be required in the following situations?

1. Sergeant Speedy is severely hurt while driving his motorcycle.

Yes No

2. Captain Disputatious, a judge advocate, assaults a nonmilitary friend in a bar following an argument over the UCMJ.

Yes No

3. An enlisted soldier contracts hepatitis after donating blood to the local Red Cross unit.

Yes No

4. A civilian employee on Post Desolate becomes ill with food poisoning after eating at the post cafeteria.

Yes No

5. An officer receives a minor cut while peeling potatoes at home.

Yes No

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. Yes. The general rule requires the unit to conduct a line of duty determination when a soldier incurs an injury or disease severe enough to incapacitate the soldier from the performance of duty. Neither the rank of the individual nor the location where injury/disease was incurred is a factor.
2. No. However if Captain Disputatious were injured, the answer could change. Note that tortuous conduct or criminal liability does not trigger a line of duty investigation.
3. Yes. The soldier contracted a disease.
4. No. The employee is not a soldier.
5. No. A minor cut would not usually interfere with duty. However, if the cut became infected and the officer later developed blood poisoning requiring hospitalization, then a line of duty determination would be required.

* * * * *

It is important to realize that "line of duty" and "conduct" are two different questions, and each line of duty determination must address both issues.

The "line of duty" question turns on an individual's status as a functioning member of the Army. Note that "line of duty" is a term of art involving more than the direct performance of military duties. For example, a person injured while on authorized pass or leave is as much in the line of duty (LD) as is a soldier injured while at his military post.

"Conduct" is a characterization of an individual's behavior based on tort principles.

ANSWER THE FOLLOWING QUESTIONS:

A reservist, intoxicated and an hour late for his weekend drill, was driving at 100 miles per hour along a highway posted for a maximum safe speed of 40 miles per hour. He crashed his car into a ditch severely injuring himself.

In light of the general conceptual differences between "conduct" and "line of duty," what facts in this scenario would be pertinent to a determination of the soldier's:

1. Conduct?

(a) _____

(b) _____

2. Line of duty status?

(a) _____

(b) _____

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. Conduct
 - (a) intoxication
 - (b) speeding
2. Line of duty status
 - (a) status as a reservist
 - (b) unauthorized absence

* * * * *

There are only three possible line of duty determinations:

1. In line of duty (LD). A finding for an injury or disease (1) incurred, contracted or aggravated while the soldier was on active duty, was training in an active or reserve status, was excused from duty or training, or was AWOL (absent without leave) and was mentally unsound at the inception of the absence and (2) not proximately caused by his intentional misconduct or willful negligence.
2. Not in line of duty not due to own misconduct (NLD-NDOM). A finding that an injury or disease (1) incurred, contracted or aggravated while the soldier was AWOL, unless he was mentally unsound at the inception of the absence and (2) not proximately caused by his intentional misconduct or willful negligence.
3. Not in line of duty due to own misconduct (NLD-DOM). A finding that the soldier proximately caused the injury or disease through intentional or willful misconduct.

Note that the evidence bearing on conduct might also be relevant to the line of duty determination. This is because a finding of misconduct (DOM) leads automatically to a finding of NLD. If misconduct is not present (NDOM), then the line of duty status issue must be resolved on other grounds.

ANSWER THE FOLLOWING QUESTION:

Is a determination of "in line of duty--due to own misconduct" (LD-DOM) permissible?

Yes ____ No ____

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: No. There are only three possible line of duty determinations: LD, NLD-NDOM, NLD-DOM.

* * * * *

As you would expect, most cases result in a determination of LD. This is the most favorable determination and qualifies the soldier involved for all available benefits.

The other two possible findings, both considered NLD, are adverse and result in diminished benefits. The first is NLD-NDOM. Examine chart at Appendix D to see how a soldier's benefits are affected by a NLD-NDOM finding. The other possible NLD findings is NLD-DOM. Examine Appendix E to see how a soldier's benefits are further reduced.

ANSWER THE FOLLOWING QUESTION:

Which of the two NLD findings is more adverse to a soldier in terms of entitlement to benefits?

- a. NLD-NDOM.
- b. NLD-DOM.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: (b) NLD-DOM

* * * * *

Although a loss of benefits may result from an adverse line of duty determination, such determinations are entirely administrative, and not punitive, in nature. Although a soldier may be subject to punishment under the UCMJ for the same act of misconduct, final action taken in a line of duty proceeding has no bearing on any issue in a court-martial or other disciplinary proceeding. Conversely, such a judicial or disciplinary proceeding is not determinative of the line of duty determination.

ANSWER THE FOLLOWING QUESTION:

Line-of-duty (LD) determinations are (a) _____ in nature, while courts-martial are judicial. In other words, line of duty actions and courts-martial are (b) [related] [independent] proceedings.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: (a) administrative
(b) independent

* * * * *

SECTION B. PRESUMPTIONS GOVERNING LINE OF DUTY DETERMINATIONS

A series of rebuttable presumptions normally control the outcome of a line of determination.

The government initially presumes that an injury or disease occurs “in line of duty” and “not due to own misconduct.” Note that this presumption covers both the line of duty finding and the characterization of conduct.

This presumption, as with others, is rebuttable by substantial evidence.

ANSWER THE FOLLOWING QUESTION:

A soldier is seriously injured in an automobile accident. There is no evidence to rebut application of the basic presumption. Therefore, the line of duty determination that should apply is:

- a. LD.
- b. NLD-NDOM.
- c. NLD-DOM.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: (a) LD

* * * * *

Substantial evidence of the following may rebut an initial presumption that the injury or disease was in line of duty:

1. The individual was neither on active duty nor engaged in authorized training in an active or reserve duty status;
2. The individual received the injury or contracted the disease during a period of unauthorized absence; or
3. The individual proximately caused the injury or disease through willful negligence or intentional misconduct.

The presumption as to the characterization of conduct can be overcome only by a showing of substantial evidence that the injury or disease was proximately caused by the intentional misconduct or willful negligence of the individual.

ANSWER THE FOLLOWING QUESTIONS:

1. A soldier is seriously injured in an automobile accident. There is substantial evidence that the accident resulted from the servicemember's intentional misconduct. The appropriate line of duty determination is:

- a. LD.
- b. NLD-NDOM.
- c. NLD-DOM.

Explain your answer:

2. A soldier is seriously injured while absent without authority. There is no evidence as to the cause of the injury. The appropriate line of duty determination is:

- a. LD.
- b. NLD-NDOM.
- c. NLD-DOM.

Explain your answer:

[ANSWERS ON FOLLOWING PAGE]

ANSWERS:

1. (c) NLD-DOM. A showing by substantial evidence of misconduct affects both the line of duty finding and the characterization of conduct.
2. (b) NLD-NDOM. The unauthorized absence, while affecting the line of duty finding, does not overcome the presumption as to the characterization of conduct.

* * * * *

A further presumption is that a soldier was in sound physical and mental condition upon entering military service. If this presumption is overcome by a showing of substantial evidence, it is further presumed that any other disability or death that results from a pre-existing injury or disease was caused by service aggravation. Only specific findings of natural progress of the pre-existing injury or disease, based upon well-established medical principles, as distinguished from medical opinion alone, are enough to overcome the presumption of service aggravation.

ANSWER THE FOLLOWING QUESTION:

Private Smith entered active duty suffering from an undiscovered disease. While on active duty he became physically disabled. Due to the exotic nature of the disease, there is no medical authority as to whether the disability is the natural result of the pre-service disease. The appropriate determination would be:

- a. LD.
- b. NLD-NDOM.
- c. NLD-DOM.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: (a) LD. The presumption as to service aggravation can only be overcome based on well-established medical principles.

* * * * *

AR 600-8-1 sets out specific rules pertaining to cases of suicide. The regulation applies a presumption of accidental self-destruction unless substantial evidence of a greater weight than supports any other conclusion shows that the individual caused his own death through intentional misconduct or willful negligence. The regulation presumes that a sane person will not commit suicide. Therefore evidence, which merely establishes the “possibility” of suicide will not overcome the general line of duty presumption.

AR 600-8-1, para. 41-11 and Rule 10, Appendix F provide more detailed guidance.

ANSWER THE FOLLOWING QUESTIONS:

1. The presumption as to accidental death can only be overcome by a showing of _____ evidence of self-destruction.
2. [True-False] The taking of one's life through negligence rather than willful negligence will result in a finding of LD.

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. substantial
2. True.

* * * * *

Note that in cases involving death the Veterans Administration (VA) determines whether the individual was in line of duty. Nonetheless, an investigation into the surrounding circumstances may still be necessary. AR 600-8-1, para. 41-12.

ANSWER THE FOLLOWING QUESTION:

Which of the following best describes how a case involving a service member's death is handled?

- (a) Conduct an investigation and make a determination based upon the circumstances and other available evidence.
- (b) Make a line of duty determination only where the deceased soldier has dependent survivors who may be eligible for VA benefits.
- (c) Investigate the surrounding circumstances when required, but make no determination.
- (d) Conduct no investigation and make no determination.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: (c)

* * * * *

SECTION C. DEFINITIONS

In order to support a determination of NLD-DOM, that determination must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion, that the injury or disease was proximately caused by the service member's intentional misconduct or willful negligence. Simple or ordinary negligence or carelessness alone, does not constitute misconduct.

This section amplifies the above statement and defines the emphasized terms of art as they are used in AR 600-8-1. Remember, as explained in Section B, certain presumptions apply and provide a starting point for making determinations.

1. Standard of proof. Findings must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. The evidence must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of a fact.

ANSWER THE FOLLOWING QUESTION:

The standard of proof used in line of duty determinations is more analogous to the ("preponderance of the evidence") ("beyond a reasonable doubt") standard.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: preponderance of the evidence

* * * * *

2. Proximate cause refers to the connecting relationship between an act of the service member and a disease or injury that results. It is a direct cause, as opposed to merely a contributing cause. In general, it must appear that under the circumstances the soldier could have reasonably expected that the injury or disease might be caused by his conduct.

ANSWER THE FOLLOWING QUESTION:

A soldier drove his car into a ditch while absent without authority, speeding, and heavily intoxicated. Miraculously he suffered only minor scratches. However, while extricating himself from the ditch, a vagrant severely beat and robbed him. Paramedics delivered him to the local emergency room, where the doctor admitted him for continued hospitalization resulting from the beating. The appropriate line of duty determination would be:

- a. LD.
- b. NLD-NDOM.
- c. NLD-DOM.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: (b) NLD-NDOM. If the soldier had been hospitalized as a result of injuries directly resulting from the automobile accident, the appropriate determination would have been NLD-DOM. However, since the subsequent beating and its resulting injuries were not reasonably foreseeable consequences of the wreck, there is no proximate cause link between the speeding and drinking and the incapacitating injuries. Since the soldier was absent without authority however, his status is not in line of duty despite the lack of misconduct.

* * * * *

3. Intentional misconduct refers to any wrongful or improper conduct that is intended or deliberate. The intent can be expressed or implied. In addition, the misconduct need not constitute an offense under the Uniform Code of Military Justice (UCMJ). The attorney should consult the presumption contained in AR 600-8-1, app. F in cases involving suspected intentional misconduct.

ANSWER THE FOLLOWING QUESTION:

Private Mary Smith injured her knee through intentional misconduct that was not a punishable offense under the UCMJ. The lack of offense under the UCMJ (is) (is not) determinative of the line of duty determination.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: is not

* * * * *

4. Willful negligence is a conscious and intentional omission of the proper degree of care under the circumstances. Willfulness can be expressed or implied. A reckless disregard of the consequences of an act as they may affect life or property is presumed to be willful. Note that simple negligence does not constitute misconduct under the Line of Duty system.

ANSWER THE FOLLOWING QUESTION:

If an injury results from a soldier's driving 5 miles per hour in excess of the posted speed limit, the appropriate line of duty determination, in the absence of any other evidence, would appear to be (a) _____. If the injury resulted from the soldier's driving 25 miles per hour over the speed limit on a winding road during a rain storm, a line of duty determination of (b) _____ would appear to be appropriate.

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

- (a) LD
(b) NLD-DOM

* * * * *

SECTION D. LINE OF DUTY INVESTIGATION PROCEDURES

A commander can initiate three types of line of duty investigations depending upon the soldier's status and the circumstances surrounding the injury, disease or death. The first two, a presumptive determination and an informal investigation, may only result in a finding of "in line of duty." However, when a commander suspects misconduct or status issues, the commander must initiate a formal investigation.

ANSWER THE FOLLOWING QUESTION:

In order to support a determination of NLD-NDOM or NLD-DOM the _____
_____ procedure must be utilized.

[ANSWER ON THE FOLLOWING PAGE]

ANSWER: formal investigation

* * * * *

Generally, a medical officer at a military treatment facility (MTF) originates the line of duty action by completing Section 1 of DA Form 2173, Statement of Medical Examination and Duty Status (see app. F for sample DA Form 2173).

In cases of a presumptive determination or informal investigation, the injured, diseased, or deceased soldier's unit commander completes Section II of DA Form 2173 and forwards the document to the special court-martial convening authority (SPCMCA) or higher authority for review. When required, the SPCMCA forwards the document to the final approving authority.

In cases involving a formal investigation, the unit commander still completes DA Form 2173 and forwards it to the SPCMCA. The SPCMCA then appoints an investigating officer who conducts the investigation using DD Form 261, Report of Investigation, Line of Duty and Misconduct Status, to report his findings (see app. H for sample DD Form 261). The SPMCA forwards the investigation through the reviewing authority to the final approving authority.

COMPLETE THE FOLLOWING:

As a general rule, regardless of the line of duty procedure used in a particular case, a
(a) _____ initiates the line of duty procedure and the soldier's
(b) _____ completes Section II of DA Form 2173.

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

- (a) medical officer
- (b) unit commander

* * * * *

A soldier under investigation has certain due process rights. First, the investigating officer must notify the soldier in writing that he is the subject of a line of duty investigation. Further, the investigating officer must allow the soldier to submit evidence. However, the investigating officer must also inform the soldier that he has a right not to make statements against interest relating to the origin or cause of the injury or disease. A statement made without such warning must be excluded as evidence supporting an unfavorable line of duty determination (10 U.S.C. § 1219).

An investigating officer must additionally provide notice to the soldier of an intended adverse finding along with a copy of the investigation and evidence. The soldier has the right to submit rebuttal evidence, but need not make a statement against interest as previously explained. The investigating officer must consider the soldier's submissions before finalizing his findings.

Once the final approval authority acts on the findings, he must inform the soldier of the results and the soldiers right to appeal the decision. The soldier may appeal within thirty days of receipt of such notice.

ANSWER THE FOLLOWING QUESTIONS:

1. [True-False] In a line of duty investigation, the investigating officer must give the soldier under investigation an opportunity to submit evidence to the investigating officer.
2. [True-False] A soldier may appeal an adverse line of duty finding.

[ANSWERS ON THE FOLLOWING PAGE]

ANSWERS:

1. True.
2. True.

* * * * *

SECTION E. ROLE OF THE MILITARY ATTORNEY

A judge advocate has various roles in the line of duty process:

1. Advising the subject soldier of his rights during the conduct of a line of duty investigation and of the benefits at stake in the event of an adverse determination (AR 600-8-1, para. 41-5);
2. Advising unit commanders and investigating officers on which procedure to use; and
3. Reviewing completed line of duty actions for legal sufficiency.

* * * * *

REVIEW PROBLEM:

Fort Hope Military Police (MP) arrived at the Go-Go Shack located outside Fort Hope's main gate after receiving a phone call from local police. Upon their arrival, the club manager directed the MP's to an unconscious soldier lying in the alley behind the shack. The soldier was later identified as Private Sidney Sufferin. Private Sufferin is presently hospitalized in the Fort Hope Army Hospital recovering from his injuries; he has no recollection of the events leading up to his injuries.

ANSWER THE FOLLOWING QUESTIONS:

1. Assuming no additional evidence is discovered, the appropriate line of duty determination would be (a) _____. This determination results from the (b) _____ that the injuries were incurred (c) _____ and (d) _____.

2. If Private Sufferin's presence at the Go-Go Shack was in violation of an order of his company commander restricting Private Sufferin to the limits of the company area, the appropriate line of duty determination would be _____.

3. If there were sufficient evidence to establish that Private Sufferin's injuries resulted from his drunken attempt to fly from the roof of the Go-Go Shack, the appropriate determination would be _____.

4. In order to support a determination of NLD-NDOM or (a) _____ in Private Sufferin's case, the commander must use the (b) _____ procedure.

5. [True-False] AR 600-8-1 requires a legal sufficiency review before the final approval of a NLD-NDOM or NLD-DOM determination in Private Sufferin's case.

[ANSWERS ON THE FOLLOWING PAGE]

REVIEW PROBLEM ANSWERS:

1. (a) LD
(b) presumption
(c) in line of duty
(d) not due to the individual's own misconduct
2. NLD-NDOM
3. NLD-DOM
4. (a) NLD-DOM
(b) formal investigation
5. True.

APPENDIX C
AUTHORITY TO COLLECT

	Involuntary Current Pay	Voluntary Final Pay	Litigation
Enlisted	Yes ¹	Yes ¹	Yes
Officer			
accountable officer ²	Yes	Yes	Yes
personal arms & equipment	Yes	Yes	Yes
negligent acts or misconduct	Yes	Yes ³	Yes
Civilian	Yes ⁴	Yes	Yes

- Notes:
1. The service member must receive at least 1/3 of his pay.
 2. In most circumstances—check 37 U.S.C. § 1007(f).
 3. Using the general rule of set-off.
 4. *See*, Debt Collection Act, 5 U.S.C. § 5514.

